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No. 10-168

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

LIFE SETTLEMENT CORPORATION
d/b/a PEACHTREE LIFE SETTLEMENTS,

*Petitioner,*

*v.*

GOSHAWK DEDICATED LIMITED AND KITE DEDICATED LIMITED F/K/A GOSHAWK DEDICATED (NO. 2), AS MEMBERS OF SYNDICATE 102 AT LLOYD'S,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Has Petitioner presented compelling reasons to grant the Petition, where the New York Court of Appeals held that where the parties agree to arbitrate "all disputes", including the "existence, scope or validity of the arbitration agreement", the arbitrators should decide Petitioner's challenge to the "existence" or "validity" of the Arbitration Agreement after this Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008)?

2. Has Petitioner presented compelling reasons to grant the Petition, where in deciding a now moot issue, the New York Court of Appeals held that in light of the parties' agreement to arbitrate the "scope . . . of the arbitration agreement", the arbitrators should decide Petitioner's challenge to the "scope" of the Arbitration Agreement in light of the Pay First clause of the contract?

## PARTIES TO THE PROCEEDING

The Petitioner, who was the appellant below and a defendant before the motion court, is Life Settlement Corporation d/b/a Peachtree Life Settlements.

The Respondents, who were the appellees below and also defendants before the motion court, are the two underwriting members of Lloyd's Syndicate 102: Goshawk Dedicated Limited, as sole member for the 2000 year of account, and Kite Dedicated Limited f/k/a Goshawk Dedicated (No. 2) Limited as sole member for the 2001-03 years of account.[1]

Respondent Goshawk Dedicated Limited is wholly owned by Goshawk Capital Limited, which is wholly owned by Goshawk Insurance Holdings plc, which is a publicly held company.

Respondent Kite Dedicated Limited f/k/a Goshawk Dedicated (No. 2) Limited does not have a parent corporation and the following are corporations that own 10% or more of its stock:

Dawn Group Limited
Grafton Group UK, plc
Hilton Group, plc
Peacock Group Retail Limited
William Grant & Sons Limited

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[1] Contrary to references in Peachtree's Petition, Lloyd's of London is not a party to the Arbitration Agreement, underlying arbitrations, or this action.

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## INTRODUCTION

Petitioner Life Settlement Corporation d/b/a Peachtree Life Settlements ("Peachtree") has presented no "compelling reasons" for the Court to grant its Petition for a Writ of Certiorari ("Petition"). *See* Sup. Ct. R. 10. The parties specifically agreed to arbitrate "any dispute" including "the existence, scope and validity of the arbitration agreement." Peachtree has never challenged the delegation provision within the arbitration agreement. A total of thirteen judges on three New York courts have now considered this issue and all have correctly enforced the parties' agreement that the arbitrators should determine the "validity" of the agreement in light of *Hall Street*. The courts also correctly found, consistent with this Court's precedent, that the "scope" of the arbitration agreement, including the effect *vel non* of the contract's Pay First Clause, is for the arbitrators, not the court, to decide by reason of the parties' arbitration agreement.

The New York Court of Appeals' decision to which Petitioner's Petition is addressed (the "Decision") is consistent with relevant decisions of this Court. This Court has stated that the Federal Arbitration Act ("FAA") "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478 (1989). In *AT&T Techs, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986), the Court stated that parties may agree to arbitrate arbitrability. In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S.

938, 942-43 (1995), the Court held that where there is clear and unmistakable evidence that the parties so agreed, the arbitrators could decide the question of whether the parties agreed to arbitrate. Subsequently, in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002), the Court explained that whether the parties are bound by a given arbitration clause, and whether a binding arbitration clause applies to a particular type of controversy, are questions of arbitrability. The Court also held in *Howsam* that procedural questions concerning pre-requisites to arbitration are for the arbitrators to decide. *Id.* at 84-85.

In *Preston v. Ferrer*, 552 U.S. 346, 362-363 (2008), this Court looked to the arbitral rules incorporated by reference in an arbitration agreement. Just a few short months ago, in *Rent-A-Center, West, Inc., v. Jackson*, 130 S.Ct. 2772, 2777 (2010), the Court stated "[w]e have recognized that parties can agree to arbitrate 'gateway' questions of arbitrability, such as whether the parties agreed to arbitrate or whether their agreement covers a particular dispute." Unless a party "challenged the delegation provision specifically, courts must treat it as valid and leave any challenge to the arbitration agreement as a whole to the arbitrator. *Id.* at 2779. The Court also held that a challenge not mentioned below to the delegation provision is "too late and we will not consider it." *Id.* at 2781.

Consistent with this Court's authority, the New York Court of Appeals held that pursuant to the clear and unmistakable language of the Arbitration Agreement and the arbitration rules

incorporated therein, Peachtree agreed to arbitrate the existence, scope and/or validity of the arbitration agreement. Pet. App. at 1a-2a. Thus, Peachtree, agreed to arbitrate its challenge to the "existence" or "validity" of the Arbitration Agreement in light of *Hall Street*. Moreover, Peachtree's "Pay First" argument goes to the "scope" of the arbitration agreement, and thus, must be decided by the arbitrators. As noted above, Peachtree has never challenged the delegation provision within the Arbitration Agreement.

The Decision is also correct because the Petitioner misconstrues the *Hall Street* decision, which did not eliminate judicial review of arbitration awards. *Hall Street* says only that Sections 10 and 11 are the exclusive grounds for vacatur under the FAA.

Simply put, the New York Court of Appeals correctly applied this Court's precedents in reaching its decision. Thus, the Petition should be denied.

## STATEMENT OF THE CASE

### A. The Parties.

#### 1. Peachtree.

Peachtree is a "Settlement Provider," which means that Peachtree buys life insurance policies issued on the lives of the elderly ("life settlements"). Pet. App. at 20a. Upon purchase, the life insured receives an immediate payment, while Peachtree (or its assignee, Life Receivables Trust

["LRT"]) becomes the new policy owner and beneficiary on the life policy and becomes responsible for paying premiums to maintain the life policy. *Id.*

### 2. LRT.

LRT is a special purpose vehicle that Peachtree created through an affiliate to hold in trust the life insurance policies originated and serviced by Peachtree. *See id.* By the terms of the agreements establishing LRT, LRT was to be a passive entity with no employees. *See* Trust Agreement (RA:210).[2] Everything LRT "did" in terms of its business operations was in fact done for it by its admitted "agent",[3] creator, Servicer, and Originator, Peachtree. *See* LRT's May 4, 2006 letter (RA:270-84); *see also* CCI at p. 2 of 24 (RA:21, RA:50, RA:95, RA:131).

### 3. Syndicate 102.

The risk to Peachtree or its assignee, LRT, lies in the possibility that the life insureds will live for many years, thereby extending the time that Peachtree or LRT must pay premiums to maintain the life policies and delaying the time for LRT to collect the net death benefit under the life policy. Purportedly to hedge against this risk, Peachtree

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[2] The citations to the Joint Appendix and the Confidential Respondent's Appendix filed with the New York Appellate Division are referenced in this brief as "A:__" and "RA:__", respectively.

[3] *See* LRT's September 14, 2005 Statement of Claim at ¶ 25 (A:276-77).

procured Contingent Cost Insurance ("CCI") for LRT from Syndicate 102.[4] Pet. App. at 21a. The CCI was to cover the risk of aberrational life over-run on every life policy acquired by Peachtree against the contingency that one or more of the life insureds would live more than a prescribed "Deferred Period" (typically, two years) beyond the Life Expectancy ("LE") determined by an independent medical life evaluator (*i.e.*, LE + 2 years = trigger date). *See* CCI "Interest" and "Deferred Period" at p. 3 of 24 (RA:22, RA:51, RA:96, RA:132).

Peachtree hired the medical evaluator (such as American Viatical Services or "AVS") to provide a purportedly independent LE of the life insured. To determine the LE, the medical evaluator purportedly assessed the life insured's medical records, using actuarial methods and medical evaluation independent of influence by the settlement provider. Peachtree declared the LE to the CCI by providing to Syndicate 102 the endorsement and bordereaux by which each LE was incorporated into, and became a term of, the CCI. *See, e.g.*, CCI Endorsements (RA:44-48). Peachtree declared all LEs after the Syndicate 102 Underwriters signed the CCI. *Id.*

If the life insured was still alive two years beyond the purportedly independent LE, Syndicate 102 undertook to pay the net death benefit of the life insurance policy to LRT, while ownership of the underlying policy and the necessity of paying

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[4] LRT was Peachtree's assignee for all of the life policies declared to the CCI. (RA:21, RA:50, RA:95, RA:131)

premiums to keep it in force would pass concurrently to Syndicate 102. *See id.* In the Arbitrations, Syndicate 102 alleges, *inter alia*, that LRT and Peachtree conspired with the purportedly independent medical evaluators to create artificially shortened LEs, to defraud Syndicate 102. (RA:184-95, RA:196-206, RA:4-19)

### B. The Arbitration Agreement.

LRT, Peachtree, and Syndicate 102 are all parties to the CCI, which contains the Arbitration Agreement. (A:603) All four tranches of the CCI contain the same arbitration clause. As the Motion Court noted at oral argument, the arbitrators' grant of authority is in Paragraph 1. (A:738) Indeed, Paragraph 1 of the Arbitration Agreement gives the arbitrators broad authority to decide "all disputes" in accordance with the American Arbitration Association ("AAA") Rules:

> 1. All disputes and differences arising under or in connection with this Insurance shall be referred to arbitration under the American Arbitration Association Rules.

(RA:42, RA:71, RA:116, RA:152) (emphasis added). Article 15.1 of the AAA's International Dispute Resolution Procedures ("IDRP")[5] provides:

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[5] The AAA's IDRP govern arbitrations involving parties from different countries. *See* IDRP Article 1a (A:704).

> The tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

*See* IDRP Article 15.1 (A:708) (emphasis added). Paragraph 2 of the Arbitration Agreement specifies the experience required of the arbitrators, and also provides the method of appointment where a party fails to name an arbitrator within the specified time.

Paragraph 3 of the Arbitration Agreement gives the arbitrators "the widest discretion permitted under the law" in making orders:

> 3. The Arbitration Tribunal may in its sole discretion make such orders and directions as it considers to be necessary for the final determination of the matters in dispute; provided that the parties shall each retain the right to appeal errors of law to a court of law having jurisdiction of the matters addressed herein and, each party executing this Insurance hereby consents and agrees that the state or federal courts located in New York shall have exclusive jurisdiction to hear and determine any such matters. The Arbitration

> Tribunal shall have the widest discretion permitted under the law governing the arbitral procedure when making such orders or directions.

(RA:42, RA:71, RA:116, RA:152)(emphasis added).

Paragraph 4 of the Arbitration Agreement specifies the seat of arbitration, as well as the apportionment of costs of the arbitration. *Id.*

### C. The Three Arbitrations.

#### 1. The LRT Arbitration.

In September 2005, LRT commenced the LRT Arbitration to recover on the Wang claim, when Mr. Wang lived two years beyond his LE. Pet. App. at 22a. Syndicate 102's defense in the LRT Arbitration is based on a fraudulent LE that LRT and Peachtree presented to the Syndicate. (RA:184-95) In 2006, LRT asked the arbitrators to enforce the Pay First and Recourse clauses, making arguments similar to those that Peachtree made to the courts below. On October 24, 2006, the Panel issued Interim Order No. 5, which rejected LRT's Pay First and Recourse arguments and denied LRT's motion. (RA:296-98) In December 2006, the LRT Panel issued a subpoena to Peachtree, and in November 2008, the U.S. Court of Appeals for the Second Circuit held that the LRT Panel could compel documents from Peachtree by making the Subpoena returnable to one of the arbitrators at a "preliminary" conference, before the final hearing on

the merits. *See Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 218 (2d Cir. 2008).[6]

### 2. The Peachtree Arbitration.

In July 2006, Syndicate 102 commenced the Peachtree Arbitration against Peachtree. *See* Syndicate 102's July 21, 2006 Statement of Claim (RA:196-206).

### 3. The Omnibus Arbitration.

On March 28, 2008, Syndicate 102 commenced arbitration against both LRT and Peachtree to rescind the entire CCI based on the fraudulent LEs that Peachtree supplied for several life insureds, and to recover damages from Peachtree for its fraud. (RA:4-19) By filing the Statement of Claim against both LRT and Peachtree, Syndicate 102 included in the Omnibus Arbitration all parties to the CCI so that complete and final relief could be obtained against all players, concerning fraud in all LEs over the full course of the CCI, in one proceeding. In addition, having Peachtree and LRT in the same proceeding would stop the discovery shell games that delayed the LRT Arbitration.

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[6] In its brief on appeal to the Second Circuit, Peachtree argued that the Pay First and Recourse Clauses deprived the LRT Arbitration Panel of the authority to permit discovery and to issue the Subpoena. In September 2008, Peachtree withdrew the Pay First and Recourse Clauses as grounds for that appeal. As the Second Circuit noted, the LRT Arbitration Panel had previously denied LRT's Pay First motion. *See LRT*, 549 F.3d at 213, n.3.

The Arbitration Agreement required the parties to name arbitrators by April 14, 2008. Syndicate 102 timely nominated an arbitrator, but LRT and Peachtree missed their deadline. On April 15, Syndicate 102 formally asked the AAA to name an arbitrator for LRT and Peachtree, or in the alternative to appoint all three members of the Panel. (RA:311-13) Two days later, LRT filed the federal action to stay the Arbitrations, which was dismissed for lack of subject matter jurisdiction, and LRT filed the instant action on April 24, 2008. (A:571)

### D. The State Court Action.

#### 1. The Procedural History.

In April 2008, LRT commenced this action against Syndicate 102 in New York State Supreme Court, New York County (the "Motion Court") and filed a motion to preliminarily and permanently enjoin arbitrations, by Order to Show Cause on April 25, 2008. (A:28-55, A:282-84)

On April 30, 2008, Syndicate 102 filed a motion to join Peachtree as a party after LRT refused to voluntarily add its agent, Peachtree, to the proceeding. (A:308) On May 2, 2008, LRT served a Supplemental Summons and Amended Complaint, adding Peachtree as a party to the action, but making no allegations against Peachtree and seeking no relief from Peachtree. (A:331-59) Peachtree aligned itself with LRT and sought to stay the arbitrations.

As a result of the briefing schedule, Peachtree filed its response to LRT's motion on the same day as Syndicate 102, thereby ensuring that Syndicate 102 would be unable to respond to Peachtree's argument or purported evidence. At that time, Peachtree did not submit any contemporaneous documents with its motion, but instead submitted an after-the-fact affidavit by Peachtree's CEO, James Terlizzi. (A:565-66) (LRT did not submit any such evidence to support its motion.)

### 2. The Motion Court Decision.

The Motion Court held that the plain and expansive language of "the Arbitration Agreement unequivocally establishes that the parties agreed to arbitrate their disputes arising out of the CCI" and empowers the arbitrators to decide the "existence, scope or validity" of the Arbitration Agreement:

> Where, as here, the parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, that incorporation constitutes clear and unmistakable evidence that arbitrability is to be decided by the arbitrators (*Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 [2d Cir. 2005]).

Pet. App. at 24a. (emphasis added). Moreover, the Court rejected Petitioner's *Hall Street* arguments,

stating that *Hall Street* did not mandate "the invalidation of the parties' agreement to arbitrate." Pet. App. at 26a.

### 3. The Intermediate Appellate Court Decision.

LRT and Peachtree appealed the Motion Court's decision to the New York Appellate Division. The Appellate Division affirmed the decision:

> Although the question of arbitrability is generally an issue for judicial determination, when the parties' agreement specifically incorporates by reference the AAA rules, which provide that "[t]he tribunal shall have the power to rule on its own jurisdiction, including objections with respect to the existence, scope or validity of the arbitration agreement," and employs language referring "all disputes" to arbitration, courts will "leave the question of arbitrability to the arbitrators".

Pet. App. at 4a (internal citation omitted). One judge issued a separate concurrence. *Id.* at 6a-16a.

### 4. The Decision.

The New York Appellate Division granted LRT and Peachtree the right to appeal the

court's unanimous affirmance to the New York Court of Appeals. The Court of Appeals decided that the case did not warrant full briefing or oral argument. Pet. App. at 2a. *See* N.Y. Comp. Codes R. & Regs. tit. 22, § 500.11. Instead, the Court of Appeals reviewed the briefing submitted to the Appellate Division, along with supplemental letter briefs submitted by the parties. After this review, the Court of Appeals unanimously affirmed the Appellate Division's decision.

> [C]lear and unmistakable evidence exists in this case that the parties agreed to arbitrate questions of arbitrability, including whether the parties' arbitration agreement is invalid under *Hall St. Assoc.* or whether the apparently offending provision could be severed from the remainder of the agreement.

Pet. App. at 2a. Peachtree filed a motion to reargue, but the Court of Appeals unanimously denied that motion. *Id.* at 29a-30a. Peachtree now seeks a Writ of Certiorari from this Court.

## REASONS FOR DENYING THE PETITION

### I. THE DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENT AND FEDERAL LAW.

#### A. The Parties Clearly and Unmistakably Agreed that the Arbitrators will Decide the

**"Existence, Scope or Validity of the Arbitration Agreement."**

Peachtree argues that because it "challenged the validity and enforceability" of the Arbitration Agreement, "the FAA and this Court's precedents command judicial determination of Peachtree's challenge." Pet. at 19-20. In support of this contention, Peachtree relies on this Court's decisions in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010) and *Granite Rock Co. v. International Brotherhood of Teamsters*, 130 S.Ct. 2847 (2010). Pet. at 19-20, 22. However, the Decision is consistent with this Court's precedent, including the recent decisions in *Rent-A-Center* and *Granite Rock*.

Contrary to Peachtree's assertions, *Prima Paint* does not support the argument that that only courts decide questions regarding the making of arbitration agreements. Pet. at 9, 19-20. Rather, *Prima Paint* was clear that it was placing a limitation on the court's authority. *See Prima Paint*, 388 U.S. at 404 ("We hold, therefore, that . . . a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.").[7] Subsequent to *Prima Paint*, this Court

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[7] Peachtree notes that the arbitration provision at issue in *Prima Paint* referred to the AAA Rules (Pet. at 20 n.13), but Peachtree fails to advise the Court that the AAA rules at issue in that 1967 decision did not include a provision giving the arbitrators the authority to rule on questions regarding the "existence, scope or validity" of the arbitration agreement. *See* Am. Arb. Ass'n., *Commercial Arbitration Rules* (1964),

has held that the parties can agree to arbitrate the arbitrability issue, *i.e.*, the existence, scope and validity of an arbitration agreement.

Section 2 of the FAA provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (Pet. App. at 31a). Subsequent to *Prima Paint*, this Court has stated that Section 2 of the FAA "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478 (1989). Consistent with this principle, where the "parties clearly and unmistakably" so agree, the arbitrators decide "'gateway' questions of 'arbitrability'". *See Rent-A-Center*, 130 S.Ct. at 2777; *AT&T Techs, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986) ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the

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*reprinted in A Dictionary of Arbitration and its Terms*, at 289-293 (Katherine Seide ed., Am. Arb. Ass'n 1970).

parties agreed to arbitrate is to be decided by the court, not the arbitrator.") In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the Court explained the basis for this rule.

> Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, . . . so the question "who has the primary power to decide arbitrability" turns upon what the parties agreed about *that* matter.

*Id.* at 943 (emphasis in original, citations omitted). If there is clear and unmistakable evidence that the parties agreed to arbitrate arbitrability, then the court enforces that agreement. *See id.* at 944. Subsequently, in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002), the Court explained that whether the parties are bound by a given arbitration clause, and whether a binding arbitration clause applies to a particular type of controversy, are questions of arbitrability.

Here, the New York Court of Appeals faithfully applied this Court's precedents and enforced the parties' clear and unmistakable agreement that the arbitrators decide the "existence, scope or validity of the arbitration agreement."[8] In

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[8] Peachtree asserts that the courts below confused the question of the validity of the arbitration agreement with the issue of arbitrability. Pet. at 9 n.9. In support of this assertion, Peachtree ignores this Court's precedent. In

*Howsam*, 537 U.S. at 83, this Court stated that "a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' . . . ."

Further, Peachtree misplaces its reliance on *Cap Gemini II*, and fails to apprise this Court of the Second Circuit's subsequent decision (in *Cap Gemini IV*) that squarely supports Syndicate 102's position. *Cap Gemini Ernst & Young U.S., LLC v. Nackel*, 346 F.3d 360 (2d Cir. 2003) ("*Cap Gemini II*"). In *Cap Gemini II*, the Second Circuit considered whether the district court's November 2002 decision, *Cap Gemini Ernst & Young U.S., LLC v. Nackel*, No. 02-6872, 2002 WL 31626703, *2 (S.D.N.Y. Nov. 21, 2002) ("*Cap Gemini I*") improperly applied New York (rather than California) law when compelling arbitration. *Id.* at 361. The *Cap Gemini II* court did not reach the issue of arbitrability. *See id.* at 365-66. Rather, it remanded the case for further development of the choice-of-law question. *Id.* at 365.

On remand, the district court confirmed that New York law applied. *Cap Gemini Ernst & Young U.S., LLC v. Nackel*, No. 02-6872, 2004 WL 569554 (S.D.N.Y. Mar. 23, 2004) ("*Cap Gemini III*"). On appeal—for the second time—the Second Circuit affirmed *Cap Gemini III* and "reinstated and affirmed" *Cap Gemini I*. *See Cap Gemini Ernst & Young U.S., LLC v. Nackel*, 98 F. App'x 65, 66 (2d Cir. 2004) ("*Cap Gemini IV*"). Significantly, in *Cap Gemini I*, the district court found that the parties agreed to arbitrate arbitrability. 2002 WL 31626703, *2.

Peachtree also relies (Pet. at 10 n.9), on an outlying district court case. *See Nichols v. Washington Mutual Bank*, No. 07-cv-3216, 2007 WL 4198252 (E.D.N.Y. Nov. 21, 2007). But this case is flawed. In *Nichols*, the court recognized that there is a distinction between challenges to the validity of an agreement and challenges to the validity of the arbitration clause. "Nichols's challenges are to the existence and validity of the arbitration clause, . . . [the court] must decide them." *Id.* In so deciding, the *Nichols* court ignored this Court's precedent.

fact, in deciding this case, the New York Court of Appeals relied on its prior decision in *Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 46 (N.Y. 1997), where the court held that the parties could, and did, agree to arbitrate arbitrability. In reaching its conclusion in *Sacharow*, the Court of Appeals cited to this Court's decisions in *AT&T* and *First Options* for the proposition that the parties can agree, through clear and unmistakable evidence, to arbitrate arbitrability. *Sacharow*, 91 N.Y.2d at 46.

### B. The Decision is Consistent with this Court's Precedent.

Peachtree argues that the Court of Appeals' decision is inconsistent with this Court's recent decisions in *Rent-A-Center* and *Granite Rock*. Pet. at 12, 15-16. However, neither case changed the rule that where the parties clearly and unmistakably agree, the arbitrators decide the "existence, scope or validity of the arbitration agreement." In fact, *Rent-A-Center* and *Granite Rock* actually support the Decision.

#### 1. Like the Unsuccessful Respondent in *Rent-A-Center*, Peachtree Has Not Challenged the Delegation Provision.

In a glaring omission, Peachtree fails to mention that in *Rent-A-Center*, this Court enforced a delegation provision in an arbitration agreement, and held that the respondent's challenge to the validity of the arbitration agreement was for the arbitrator, not the courts. *Rent-A-Center*, 130 S.Ct.

at 2779. Like the delegation provision at issue here, the "delegation provision" at issue in *Rent-A-Center* provided that the "Arbitrator . . . shall have exclusive authority to resolve any dispute relating to the . . . enforceability or formation of this Agreement including, but not limited to any claim that all or any part of Agreement is void or voidable." *Id.* at 2775.

In *Rent-A-Center*, this Court again stated the long-standing rule that parties may agree to arbitrate threshold or gateway questions, such as the existence or scope of the arbitration agreement:

> The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement. We have recognized that parties can agree to arbitrate "gateway" questions of "arbitrability," such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.

*Id.* at 2777 (emphasis added). The Court noted that such a delegation provision is simply an additional, antecedent arbitration agreement:

> An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce,

> and the FAA operates on this additional arbitration agreement just as it does on any other.

*Id.* at 2777-78. The question before the Court, therefore, was "whether the delegation provision is valid under § 2" of the FAA. *Id.* at 2778.

The written agreement at issue in *Rent-A-Center*, therefore, was the delegation provision, and the remainder of the contract was itself an arbitration agreement:

> Here, the "written provision . . . to settle by arbitration a controversy," 9 U.S.C. § 2, that Rent-A-Center asks us to enforce is the delegation provision—the provision that gave the arbitrator "exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this Agreement,". . . . The "remainder of the contract," . . . is the rest of the agreement to arbitrate claims arising out of Jackson's employment with Rent-A-Center.

*Id.* at 2779 (citations omitted, emphasis added). The Court, therefore, recognized that *Rent-A-Center* differs from *Prima Paint*, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) and *Preston v. Ferrer*, 552 U.S. 346 (2008), in that the arbitration provisions sought to be enforced in those cases existed in contracts unrelated to arbitration (*e.g.*,

contracts for consulting services in *Prima Paint*, check-cashing services in *Buckeye*, and talent agent services in *Preston*). In *Rent-A-Center*, "the underlying contract is itself an arbitration agreement." *Rent-A Center*, 130 S.Ct. at 2779; *see also id.* at 2775 (defining the "Agreement" as the Mutual Agreement to Arbitrate Claims).

Accordingly, the Court noted that unless the respondent had challenged the delegation provision specifically (as opposed to the arbitration agreement as a whole), the Court must treat the delegation provision as valid and require the parties to arbitrate the validity of the agreement. *Id.* Like Peachtree here, the respondent in *Rent-A-Center* challenged the validity of the arbitration agreement as a whole, not the delegation provision, in the motion court. *Id.* Moreover, the respondent in *Rent-A-Center* did not challenge the delegation provision on its appeal to the Ninth Circuit. *Id.* at 2780. The Court thus recognized that appellant had "noted the existence of the delegation provision," but had not challenged the validity of that delegation provision in particular. *Id.* at 2780.

The Court, therefore, refused to consider respondent's after-the-fact challenge to the delegation provision:

> In his brief to this Court, Jackson made the contention, not mentioned below, that the delegation provision itself is substantively unconscionable because the quid pro quo he was

> supposed to receive for it—that "in exchange for initially allowing an arbitrator to decide certain gateway questions," he would receive "plenary post-arbitration judicial review"—was eliminated by the Court's subsequent holding in *Hall Street* that the nonplenary grounds for judicial review in § 10 of the FAA are exclusive. He brought this challenge to the delegation provision too late, and we will not consider it.

*Id.* at 2781 (citations and footnote omitted);

Realizing that *Rent-A Center* requires a challenge specifically to the delegation provision, in the Petition, Peachtree suggests that it is challenging the delegation provision on a basis similar to the respondent in *Rent-A-Center*. Pet. at 17 n.12. This is the first time Peachtree has made such a challenge.

Like the respondent in *Rent-A-Center*, Peachtree did not challenge the delegation provision before the Motion Court. Before the Appellate Division, Peachtree noted the existence of the delegation provision (Peachtree's Dec. 8, 2008 Br. to the Appellate Division at 16), but did not challenge the delegation provision. Instead, Peachtree challenged "the entire Arbitration Agreement." *See* Peachtree App. Div. Br. at 4 (alleging that "the entire Arbitration Agreement has been rendered

invalid and unenforceable"); 27 (arguing that the Court should "strike the entire Arbitration Agreement contained in the CCI Contracts as invalid and unenforceable"); 29 (alleging that "the entire Arbitration Agreement must be invalidated.") Peachtree did not even challenge the delegation provision on its appeal to the Court of Appeals. Indeed, Peachtree's June 25, 2010 letter advising the Court of Appeals of the Court's decision in *Rent-A Center* refers to Peachtree's challenge to the "arbitration agreement that is contained" in the CCI, and not to the delegation provision in that arbitration agreement.

Further, in its Petition, Peachtree is not challenging the delegation provision. Pet. at 7 ("Peachtree claims that the arbitration provision in the [CCI] was rendered invalid and unenforceable . . . ."). In *Rent-A-Center*, the respondent finally got around to challenging the delegation provision on its appeal to this Court, but that challenge was "too late". *Rent-A-Center*, 130 S.Ct. at 2781. Similarly, if Peachtree ever gets around to challenging the delegation provision, that challenge is "too late." *Id.*

### 2. *Granite Rock* Confirms that the Parties Can Agree to Arbitrate Enforceability and Scope

The Court's recent decision in *Granite Rock* also supports the Decision. In *Granite Rock*, the relevant question before the Court was whether the District Court or an arbitrator should resolve a dispute over the date of ratification of a collective bargaining agreement. *See Granite Rock*, 130 S.Ct.

at 2853. The union claimed that the arbitrator should decide the issue; the company claimed the formation date question was for the District Court. The parties did not dispute that the District Court was the proper forum to determine the arbitrability of the ratification date dispute, *i.e.*, there was no question about whether the arbitrators should decide arbitrability. *Id.* at 2856.

Throughout its opinion, the Court reiterated that parties have the power to refer the existence or scope of an arbitration agreement to the arbitrators.

> [O]ur precedents hold that courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement *nor* (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue.
>
> * * *
>
> We have applied the presumption favoring arbitration, in FAA and in labor cases, only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular

> dispute is what the parties intended because their express agreement to arbitrate was validly formed and (absent a provision clearly and validly committing such issues to an arbitrator) is legally enforceable and best construed to encompass the dispute.

*Id.* at 2857-58, 2859-60 (internal citations omitted, italics in original, underline added). Based upon the foregoing framework, and in the absence of a provision specifically referring such dispute to the arbitrators, the Court held that the ratification date dispute went to the formation of the agreement, and thus, had to be determined by the District Court. *Id.* at 2860.

The Decision is consistent with this Court's precedent. The Arbitration Agreement and incorporated AAA Rules clearly and validly establish that the parties committed the "existence, scope or validity of the arbitration agreement" to the arbitrators. Under these facts, *Granite Rock* supports the Court of Appeals' recognition of a "valid provision specifically committing such disputes to an arbitrator." *Id.* at 2857-58.

### C. The Decision Follows This Court's Precedent in Holding that the Parties Clearly and Unmistakably Agreed to Arbitrate the Existence, Scope and Validity of the Arbitration Agreement.

Peachtree also asserts that "there is absolutely no provision in the CCI . . . submitting to arbitration the thresholds questions" of the existence, scope or validity of the Arbitration Agreement, and so it did not agree to arbitrate the "validity" of the Arbitration Agreement. Pet. at 17, 20-21. This assertion is contrary to the terms of the Arbitration Agreement, and the rules which are incorporated therein by specific reference. As noted above, the first paragraph of the Arbitration Agreement requires industry arbitration under AAA rules. (RA:42, RA:71, RA:116, RA:152). By incorporating the AAA rules, the parties agreed that the arbitrators, not a court, would decide the "existence, scope or validity" of the Arbitration Agreement. Article 15.1 of the AAA's International Dispute Resolution Procedures ("IDRP") provides as follows:

> The tribunal shall have the power to rule on its own jurisdiction, including objections with respect to the existence, scope or validity of the arbitration agreement.

*See* IDRP Article 15.1 (A:708) (emphasis added). As the New York courts correctly held, consistent with

this Court's precedent, the parties' agreement to refer "all disputes" to arbitration in accordance with the AAA rules provides clear and unmistakable evidence that the parties agreed to arbitrate Peachtree's challenge to the existence, scope or validity of the Arbitration Agreement.

This Court has looked to incorporated rules to determine the parties' intent with respect to arbitrability. In *Preston v. Ferrer*, 552 U.S. 346 (2008), the Court determined that the FAA superseded a California statute that referred certain disputes initially to an administrative agency. *Id.* at 349, 359. One of the respondent's arguments in support of the application of state law was that the contract contained a California choice-of-law clause, and that therefore, California law should apply. *Id.* at 360. In rejecting that argument, the Court noted that the contract provided for arbitration in accordance with the AAA Rules, and these rules provided the arbitrator with the "power to determine the existence or validity of a contract of which an arbitration clause forms a part." *Id.* at 361-62. The Court specifically stated that "The incorporation of the AAA rules, and in particular Rule 7(b), weighs against inferring from the choice of law clause an understanding shared by [the parties] that their dispute would be heard, in the first instance" pursuant to the California statute at issue. *Id.* at 362 (emphasis added).

In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), the Court also looked to incorporated rules to determine the parties intent as to whether the arbitration panel had the

authority to award punitive damages. *Id.* at 54. In deciding that the arbitrators had the authority to award punitive damages, the Court noted that the agreement provided that all controversies would be settled by arbitration in accordance with the NASD or NYSE rules. *Id.* at 58-59. The NASD rules provided that the arbitrators could award "damages and other relief." *Id.* at 60-61. The Court stated that this provision was "broad enough at least to contemplate" punitive damages and contradicted the argument that the parties agreed to foreclose claims for those damages. *Id.*

Consistent with *Mastrobuono* and *Preston*, other courts have looked to incorporated arbitral rules to determine if the parties agreed to arbitrate arbitrability. *See Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 211 (2d Cir. 2005); *Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 46 (N.Y. 1997).

In *Contec*, the Second Circuit considered an arbitration agreement that referred "any controversy" to arbitration in accordance with the AAA Rules.[9] Noting that the AAA rules explicitly authorized the arbitrator to "rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the

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[9] In *Contec*, the court considered Rule 7 of the AAA Commercial Arbitration Rules, which provides that the arbitrator shall have the "power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." *Contec*, 398 F.3d at 208. Here, the applicable AAA international rule is identical. *See* IDRP Article 15.1 (A:708).

arbitration agreement," the court held that as a result of the "any" dispute language and incorporation of the AAA rules, arbitrability was for the arbitrators, not the court. *Id.* at 211; *see also Shaw Group, Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 124-25 (2d Cir. 2003) (ordering arbitration of arbitrability because of the "all disputes" language and incorporation of rules, in this case of the ICC, that place arbitrability in the arbitrators' purview).

Similarly, in *Sacharow*, the New York Court of Appeals referred arbitrability to the arbitrators where the agreement employed "any" controversy language and incorporated rules that required arbitrability to be decided in arbitration. *See Sacharow*, 91 N.Y.2d at 46-47. In *Sacharow*, the Court of Appeals first noted that "the words 'any and all' are elastic enough to encompass disputes over whether . . . a claim is within the scope of arbitration." *Id.* at 46. Moreover, the court found that an NASD rule—which "empowered [the arbitrators] to interpret and determine the applicability of all provisions under this Code"—was broad enough to meet the clear and unmistakable evidence threshold. *Id.* at 46-47.

Here, the New York courts held that the incorporation of the AAA Rules, including the delegation provision, into the Arbitration Agreement constituted clear and unmistakable evidence that the parties agreed to arbitrate the existence, scope and validity of the arbitration agreement. This decision follows this Court's precedent.

## II. HALL STREET HAS NOT RENDERED THE ARBITRATION AGREEMENT A NULLITY.

As set forth above, the New York Court of Appeals' decision that the arbitrators decide Peachtree's challenge to the existence, scope and validity of the Arbitration Agreement, including the determination of the severability argument[10], is consistent with this Court's precedent. *See supra* Section I. However, even if the Court were to consider the substance of Peachtree's challenge to the Arbitration Agreement, it would find that there is no merit to Peachtree's contentions. Thus, there is an independent basis for affirming the Decision.

In challenging the Arbitration Agreement, Peachtree misconstrues the *Hall Street* decision. Pet. at 23. *Hall Street* does not limit what disputes the parties can agree to arbitrate. *Hall Street* merely says that parties cannot contractually expand the scope of judicial review of arbitral awards to include "errors of law," as the FAA provides the exclusive grounds for vacatur of an arbitration award. *See Hall Street Assoc., LLC v. Mattel, Inc.*, 552 U.S. 576, 590 (2008). Thus, Peachtree still has several different grounds for judicial review of arbitration awards by the express provisions of the FAA. *See id*; 9 U.S.C. §§ 10 & 11.

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[10] Contrary to Peachtree's argument that the courts below did not address severability (Pet. at 11), the parties fully briefed the severability issue, and after consideration of that briefing, the courts decided that this was an issue for the arbitrators to decide. Pet. App. at 2a, 5a.

In fact, in declining to expand the scope of judicial review to include "errors of law," *Hall Street* is consistent with the law as determined by some courts at the time the parties entered into the Arbitration Agreement. *See Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 (10th Cir. 2001) (holding that "parties may not contract for expanded judicial review" of an arbitrators decision); *UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992, 997-998 (8th Cir. 1998) ("we do not believe it is yet a foregone conclusion that parties may effectively agree to compel a federal court to case aside sections 9, 10 and 11 of the FAA"); *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991) (the parties "cannot contract for judicial review of that award; federal jurisdiction cannot be created by contract.").

Parties are free to relinquish their rights to litigate disputes by agreeing to arbitration. *See Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S.Ct. 1758, 1774 (2010) ("an arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution."). In any event, under state law (which would govern the question), the "errors of law" provision of Paragraph 3 is severable from the remainder of the Arbitration Agreement. *See, e.g., Caruso v. Allnet Commc'n Servs., Inc.*, 662 N.Y.S.2d 468, 469 (N.Y. App. Div. 1997) ("Rather than consider the illegal contract as void *in toto*, the *better view is to sever the offending provision and validate the basic agreement . . .*") (emphasis added); *BDO Seidman v. Hirshberg*, 690 N.Y.S.2d 854, 860 (N.Y. 1999) (severing offending portion of employment

covenant and recognizing "judicial power to sever and grant partial enforcement" of agreements). In fact, the Ninth Circuit had severed the offending provision in *Hall Street*. *See Hall Street Assocs., LLC v. Mattel Inc.*, 113 F. App'x 272, 273 (9th Cir. 2004), *rev'd on other grounds*, 552 U.S. 576 (2008) (citing *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003)). The severability decision was not before this Court for review in *Hall Street*. *See Hall St.*, 552 U.S. at 587 n.6.

Moreover, Peachtree has failed to provide contemporaneous evidence that the "errors of law" provision was a deal breaker for the entire Arbitration Agreement. Instead, taking advantage of the initial alignment of the parties in this matter, on the same day that Syndicate 102's brief was due in the Motion Court, Peachtree filed a single affidavit suggesting, after the fact, that the Arbitration Agreement would not have been entered into but for the inclusion of the "errors of law" provision.

Peachtree—which was LRT's admitted "agent" (RA:178), creator, Servicer, and Originator—filed its papers in the Motion Court in support of LRT's request for a stay on the same day that Syndicate 102 filed its papers in opposition. Petitioner disingenuously, and desperately, refer to Peachtree's affidavit as "unrebutted," when Peachtree is well aware that the briefing schedule on LRT's Order to Show Cause did not permit Respondent to file a rebuttal affidavit. *See* N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g) Rule 19.

As the Motion Court noted at the hearing on the motion, it is "very easy" for Peachtree's affiant to note "after the fact" that he would not have entered into the arbitration agreement but for the inclusion of the "errors of law" provision. (A:746). "It's far more significant and probative when it's said during the negotiations." *Id. See also Stage Club Corp. v. West Realty Co.*, 622 N.Y.S.2d 948, 951 (N.Y. App. Div. 1995) ("a question of credibility is raised" by an affidavit prepared after the fact without contemporaneous supporting evidence).

## III. THE PETITION DOES NOT RAISE A QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

### A. The "Pay First" Issue Is Moot.

As Peachtree acknowledges (Pet. at 4, n.4), LRT and Syndicate 102 have reached a settlement pursuant to which, *inter alia*, all of Syndicate 102's obligations under the CCI have been extinguished. Because of the settlement, Peachtree's argument concerning any alleged conditions precedent (*i.e.*, the "Pay First" clause in the CCI) is now moot.

### B. Peachtree's Pay First Argument Has Been Rejected.

Further, Peachtree's arguments concerning alleged conditions precedent are based on a strained, incorrect reading of the CCI, as evidenced

by the fact that those arguments have now been considered and *rejected* by the LRT Arbitration Panel, and state and federal courts. *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 213 n.3 (2d Cir. 2008) (noting that the LRT Arbitration Panel had denied LRT's "request to enforce the CCI policy's 'pay first' provision").

### C. The Arbitrators Decide the "Pay First" Issue.

Peachtree's "Pay First" argument goes to the "scope" of the Arbitration Agreement, which, as set forth above, Peachtree specifically agreed to arbitrate under the CCI. *See supra* Section I. Moreover, in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), this Court was clear that arbitrators decide arguments regarding "procedural questions" concerning prerequisites to arbitration:

> Thus procedural questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide. . . . So, too, the presumption is that the arbitrator should decide allegation[s] of waiver, delay, or a like defense to arbitrability. . . . Indeed, the Revised Uniform Arbitration Act of 2000 (RUAA), seeking to "incorporate the holdings of the vast majority of state courts and the law that has developed under the [Federal

> Arbitration Act]," states that an "arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled." RUAA § 6(c), and comment 2, 7 U.L.A. 12-13 (Supp. 2002). And the comments add that "in the absence of an agreement to the contrary, issues of substantive arbitrability...are for a court to decide and issues of procedural arbitrability, *i.e.*, whether prerequisites such as *time limits*, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." *Id.*,§ 6, comment 2, 7 U.L.A., at 13 (emphasis added).

*See Howsam*, 537 U.S. at 84-85 (italics in original; underline added) (selected internal citations omitted).

Peachtree argues that *Howsam* does not apply here because the parties agreed that a court would decide the issue, by using the phrase "under no circumstances" in the Pay First clause. Pet. at 27 n.14. However, Peachtree' misconstrues the phrase "under no circumstances"; that phrase says nothing about who will decide the Pay First issue.

Peachtree also implies that *Howsam* no longer applies because the Court's subsequent

decision in *Hall Street* stands for the proposition that the parties cannot agree to arbitrate under terms that are inconsistent with the FAA, and that allowing the arbitrator to decide whether there has been compliance with a condition precedent is at odds with the FAA. Pet. at 28 n.14. This argument is based upon an incorrect reading of *Hall Street*, which does not limit the parties' ability to refer issues to arbitration, but instead stands for the proposition that the parties cannot expand the scope of judicial review.

Peachtree also argues that *Howsam* does not apply because the "Pay First" issue is not of a "procedural nature, as it does not grow out of the dispute and bear on its final disposition."[11] Pet. at 27 n.14. In asserting this argument, Peachtree quotes from this Court's opinion in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). What Peachtree does not advise the Court is that in the relevant portion of *John Wiley*, an employer sought to bar arbitration because it claimed that the union had not complied with required pre-arbitration grievance steps. *Id.* at 555-56. The Court determined that the question of whether there had been compliance with the required pre-arbitration

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[11] In connection with this argument, Peachtree cites to *County of Rockland v. Primiano Const. Co., Inc.*, 431 N.Y.S.2d 478 (1980). *County of Rockland* is distinguishable because it (1) predates *Sacharow*; and (2) does not consider whether the parties' broad arbitration clause and incorporation of rules conferring the power to determine "existence, scope or validity" on the arbitrator confers the authority to determine arbitrability on the arbitrators.

grievance procedure was for the arbitrator. *Id.* at 557.

In support of its argument that the Court should grant certiorari, Peachtree argues that there is a split among the Federal Circuit Courts of Appeals on this issue. Pet. at 26. Peachtree cites to *Perdue Farms, Inc. v Design Build Contracting Corp.*, 263 F. App'x 380 (4th Cir. 2008), *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003) and *Kemiron Atl., Inc. v. Aguakem Int'l Inc.*, 290 F.3d 1287 (11th Cir. 2002). In none of those cases did the court determine who decides whether a condition precedent has been satisfied.[12] In fact, in all three cases, the parties submitted the questions to the court to decide. Thus, those cases are distinguishable from the present case, where the parties agreed that the arbitrators would decide this issue.

In contrast, as Peachtree notes (Pet. at 26-27), in *3M v. Amtex*, 542 F.3d 1193, 1200 (8th Cir. 2008), the court determined that the arbitrators must decide if the condition precedent was satisfied. In deciding *3M*, the Eight Circuit relied upon its prior decision reaching the same conclusion in *International Ass'n of Bridge, Structural, Ornamental, & Reinforcing Ironworkers v. EFCO Corp.*, 359 F.3d 954 (8th Cir. 2004). In turn in

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[12] The issue was also not discussed in the corresponding district court opinions. *See Perdue Farms, Inc. v. Design Build Contracting Corp.*, No. 3:06CV245, 2007 WL 87667 (W.D.N.C. Jan. 9, 2007); *HIM Portland, LLC v. Devito Builders, Inc.*, 211 F. Supp. 2d 230 (D. Maine 2002); *Kemiron Atl., Inc. v. Aguakem Int'l, Inc.*, No. 8:01-cv-926, slip op. (M.D. Fla. Oct. 8, 2001)

*EFCO*, the court relied upon this Court's decision in *Howsam* to determine that arbitrators decide whether prerequisites to arbitration have been satisfied.

In light of the fact that the allegedly conflicting decisions did not actually address the issue in this case, there is no split among the Circuits. The Petition should not be granted.

## CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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